No. 14672

IN THE

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

CANDELARIO A. AGUILAR,

*Appellant,*

vs.

UNITED STATES OF AMERICA and FRANCES G. AGUILAR,

*Appellees.*

**Appeal from the United States District Court for the District of Arizona**

# Brief of Appellee
## Frances G. Aguilar

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## Brief of Appellee

**Frances G. Aguilar**

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In this brief the parties will be referred to as they were referred to in Appellant's Brief, viz: Candelario A. Aguilar, as Appellant and Frances G. Aguilar as Appellee. Reference to the printed transcript of record will be indicated by the letter "T" followed by numerals denoting the page number.

## JURISDICTIONAL FACTS

Appellee, Frances G. Aguilar, desires to state and add Jurisdictional Facts because the Rules of Practice of United States Court of Appeals for the Ninth Circuit, Rule 18, Section 3, specifically states that the Brief of the Appellee shall be of like character with that required of the Appellant, except that no Specification of Error shall be required, and no Statement of the Case, unless that presented by the Appellant is controverted. The Appellee desires to add Jurisdictional Facts so that the Court may be informed in more detail in complying with the Rules of Practice of the United States Court of Appeals having in mind Circuit Rule 18, Section 2-B wherein it states "a statement of the pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction to review the judgment, decree or order in question . . . ".

The Appellant, Candelario A. Aguilar, filed his claim for the insurance in question with the Veterans' Administration for the proceeds of said insurance policy. The Appellant's claim to such proceeds was disallowed by the Administration of Veterans' Affairs and after a thorough investigation and review his claim was disallowed by the Board of Veterans' Appeals, which is the duly qualified Board to hear disputes of this matter; his claim was denied on April 17, 1953. (T pages 7-8-9).

This action was then instituted by the Appellant in the United States District Court for the District of Arizona under the provisions of the National Service Life Insurance Act of 1940 as amended. (Title 38 U.S.C.A. Ch. 13). (T page 1).

Appellate jurisdiction is conferred upon this Court and the trial jurisdiction upon the United States District Court for the District of Arizona by Ch. 13, Title 38 U.S.C. (38 U.S.C.A. 817 and Ch. 10 Title 38 U.S.C.), (38 U.S.C.A. 445).

## STATEMENT OF THE CASE

Appellee, Frances G. Aguilar, incorporates in essence the Appellant's Statement of the Case but adds to the Appellant's Statement of the Case the following:

The veteran, Raymond R. Aguilar, and the Appellee, Frances G. Aguilar, were married on December 31, 1948 in Phoenix, Arizona. (T page 17). The veteran lived with his wife from the date of marriage to January 8, 1949 (T page 18), however the veteran involved in this matter and the Appellee were life-long sweethearts and there had been a long and extended courtship which the Appellant, Candelario A. Aguilar, well knew of. (T page 42, page 49). The Appellee states that there is no conflict, that the veteran made oral statements to his wife and others that he definitely intended to change the beneficiary of his insurance from the Appellant to his wife. These oral statements were made not only to his wife but to Palmara Gallardo and to Carlos R. Aguilar, who is the son of the Appellant Candelario A. Aguilar, but in spite of this, unequivocally and without any rebuttal or controversy of any type whatsoever testified as to the oral statements made by his brother Raymond R .Aguilar to him. These statements of intention were made to him; and irrespective of the relationship between this witness and the Appellant, Carlos R. Aguilar, testified honestly and straightforwardly concerning the intentions of his brother. (T pages 44-45-46).

In the trial of this matter a Report of Death was introduced by the Appellee and admitted in evidence for the consideration of the District Court. This Report of Death which is defendant's Exhibit C in evidence (T page 87) specifically shows the wife Frances G. Aguilar as the beneficiary. This Exhibit we must fairly assume was considered by the Trial Court sitting as a trier of facts along with all the other matters that have been set forth in the Satement of the Case by he Appellant.

## SUMMARY OF ARGUMENT

The Appellant has set forth five (5) Specifications of Errors. We shall take up these matters in the same order in which they have been set forth by the Appellant.

### No. I

The Trial Court did not err in finding as a fact (T pages 12-13) that plaintiff failed to introduce evidence in the support of the allegations of his complaint which would justify the entry of judgment in his favor. The Trial Court found as a fact that the necessary burden of proof was successfully carried by the Appellee. It was found as a fact that the burden of proof necessary was carried and as such controverted the evidence supporting the allegations of the Appellant's complaint.

### No. II

The Trial Court did not err in finding as a fact that the Appellee, Frances G. Aguilar, introduced

sufficient evidence to support the allegations of her answer and to entitle her to judgment. The Trial Court after considering all of the evidence, both oral and documentary, did find as a fact that all of the evidence presented was sufficient to satisfy the burden of proof imposed by law upon the Appellee and as such the evidence presented was sufficient to support the judgment entered herein.

No. III

The Trial Court did not err in entering its Conclusions of Law (T pages 13-14) in that Conclusions of Law are in most instances derived from factual evidence and the Trial Court sitting as a trier of facts held that the evidence was sufficient, thereby the Conclusions of Law found are not in error.

No. IV

The Trial Court did not err in entering judgment for the Appellee herein for the reason that he did find as a matter of fact and there is sufficient evidence to sustain this finding that the insured veteran did so intend to change the beneficiary of his policy of insurance and the Trial Court did find as a matter of fact and there is sufficient evidence to sustain this finding that the necessary affirmative acts were shown to give effect to such definite intention.

No. V

The Trial Court did not err in entering judgment in favor of the Appellee as said judgment is set forth on page 14 of the transcript of record in that after considering the facts and the Conclusions of Law thereto the judgment was the necessary result.

The Appellee in substance agrees with the Appellant that the burden rests upon one claiming as a substitute beneficiary that the insured during his lifetime effected a valid change. *Collins* v. *United States,* 161 F. 2d 64 (10th Cir., 1947); 2 A.L.R. 2nd, 509. However, this burden of proof has been found by the Trial Court to have been substantially and successfully carried by the Appellee. The District Court personally heard all of the evidence and facts and ruled on them; and as stated in *McKewen* v. *McKewen,* 165 F. 2d 761, "we should not disturb the findings and judgment of the Court below because there is substantial evidence to support his findings," (Rule 52 Fed. Rules Civil Procedure, 28 U.S.C.A. following section 723-C). This same case, supra, states "it was the primary function of the lower Court to draw all the inferences that were appropriate from the evidence in the case in an effort to ascertain the intent of the deceased soldier."

Chapter 38, U.S.C.A. Section 802-G, does grant the insured the right to change the beneficiary of his National Service Life Insurance subject to the regulations imposed by the Veterans' Administration; however, it has been ruled on many times that the technicalities required by the Veterans' Administration will be "brushed aside" and not considered in these particular cases. The manifested intent of the deceased soldier is the salient factor to consider as to whether or not a valid change of beneficiary was effected. It has been stated in many cases that the notices required by the Veterans' Administration will not be required if the manifestation of intent to change the beneficiary is shown to the Trial Court. In particular the McKewen case, supra, states in reference to this "requirement for written notice of change of beneficiary of National

Service Life policy is for benefit of insurer and may be waived by it." This particular case like many others went on to state that the Veterans' Administration Appeal Board in ruling for the Appellee can be fairly assumed as having waived the notice ruling.

The Appellee is in complete accord with the Appellant that the strict compliance with the administrative requirement as he has set forth in his brief is not required in order to effect a change of beneficiary. *Kendig* v. *Kendig* 170 F. 2d 750 (9th Cir., 1948). The Kendig case, supra, which is the ruling case of this 9th Circuit and which has been affirmed by *Downing* v. *Downing,* 175 F. 2d 40 gives great credence to the manifested intent of the deceased veteran. It states that the confidential statement signed in that particular case is the most important item of proof. This Court specifically laid down the rule that this stated confidential statement meant more than evidence of an unexecuted intent. It considered the stated confidential statement not only as manifestation of intent but as a substantial affirmative act on the part of the insured to evidence the exercise of such intention. This Court in distinguishing the Kendig case from *Bradley* v. *United States,* 10th Cir., 143, F. 2nd 573, stated that the Court in the Bradley case, supra, considered the statement there only from the standpoint of its representing in and of itself an attempt to effect the change. This Court considered all of the evidence presented in the lower Court and has stated that where there are numerous pieces of evidence both oral and documentary then they are worthy of showing a manifestation of intent and an affirmative act on the part of the insured to evidence the exercise of such intention. It is interesting to note that this Court stated in the Kendig case, supra, that the Veterans' Ad-

ministration, after investigation, had accepted the soldier's confidential statement as effecting a valid change of beneficiary. We believe it to be a fair assumption that this Court will give credence to the Veterans' Administration Appeal Board in that they are the investigative administrative body in the determination of these cases insofar as the insurer is concerned.

We are in accord with the Appellant that a mere intent alone to change the beneficiary is not sufficient, *Collins* v. *United States,* 161 F. 2d 64 (10th Cir., 1947). However, much more than a mere intent has been shown in the case at bar.

## ARGUMENT

It is not the Appellee's contention or proposal that this Court adopt a rule that the beneficiary of a National Service Life insurance policy may be changed by evidence, oral and written, of a mere intent to make such a change. The case at Bar presents much more than a mere intent to effect a change. All the cases, and especially so in this particular district, state that the manifestation of intent to change the beneficiary by the veteran must be shown and some affirmative act must be shown. The leading case in this district is the Kendig case, supra. In that particular case the Court ruled that there was enough evidence of the manifestation of intent to change the beneficiary by the veteran and enough affirmative act to present that evidence to the jury, which was the trier of facts in that particular case. As we understand it, that case concluded that the Trial Court was in error in taking the case from the jury and that the jury was not to be prohibited from acting as the trier of facts. In the instant case this matter was tried before the lower Court. Evidence of the

manifestation of intent of the veteran to change the beneficiary to his wife was presented. Evidence of the required "some affirmative act" was presented. The lower Court sitting not only as the trial judge but as the trier of facts concluded that the evidence of both of these elements was sufficient to rule in favor of the Appellee. It is sound and substantiated law that an Appellate Court will not disturb the findings and the judgment of the Trial Court when there is substantial evidence to support the Trial Court's findings. The substantial evidence to support the findings of the Trial Court in the case at Bar is substantially the following:

Defendant's Exhibit A in evidence (T pages 79-83) specifically states in the past tense, "I changed everything over to your name. For instance my G.I. insurance and also you are the first one to be notified in case of emergency . . . . ".

Defendant's Exhibit B in evidence (T pages 84-86) reaffirms that manifested intent by stating "cause I already straightened everything out . . . . ".

In the case of *Senato* v. *United States,* 78 F. Supp. 536 at 538, in dealing with statements made by a veteran to his wife it states "as to the ensuing words the Government and the Plaintiff suggest—perhaps they later even argued—that this could have been an oblique expression intended 'to placate' his wife; i.e., to mislead her to the extent of saying one thing and meaning another. To so conclude would be to impute to nick a gift of duplicity, and to purpose to lie, for which we can find no support in the testimony. Nor should such a judgment lightly be passed upon one whose word as a soldier and whose makeup as a man seems to forbid the imputation of such a blemish to his character." In

the instant case Counsel for the Appellant did argue this by definite intimation. However, the entire transcript of record will show that the deceased veteran was the life-long sweetheart of the Appellee, that they were on the best of amicable marital relations, that defendant's Exhibit A in evidence (T page 79-83), defendant's Exhibit B in evidence (T page 84-86), shows the complete endearment that the deceased veteran held for his wife. In *Egleston* v. *United States,* 71 F. Supp. 114 at 116, the Court indicates by his statement that letters to a wife showing endearment are admissible and as such are to be considered. It states "one week before his death the soldier wrote in endearing terms to his wife, expressing all the love and affection for her that anyone could express." In consideration the exhibits and the entire transcript and the oral testimony which was propounded by Carlos Aguilar, the actual son of the Appellant, (T pages 43-44-45-46) and considering the testimony propounded by Palamara Gallardo (T pages 36-37-38-39-40) it is a clear assumption that the deceased veteran in the instant case held his wife in the closest of endearing esteem and as such recognized the "natural bounty of his affection" and as such very definitely manifested his intent to change his National Service Life Insurance policy by making her the beneficiary.

Having shown the definite manifestation of intent by the deceased veteran; what then is there to show the requirement of "some affirmative act?" The Appellee submits that the letters themselves are enough affirmative ast as required by the great majority of cases. In the Kendig case, supra, it was considered that the veteran's statements and the confidential statement signed with the aviation squadron was enough of "some

affirmative act" to be considered and passed on by the jury. The confidential statement which was considered in that case was not by any means to be considered as any type of formal change or notice of beneficiary. It specifically stated that it was not to be opened until after the death of the deceased veteran. In the case at Bar we have specific letters which unequivocally state that the change of beneficiary had been made. Evidence was properly introduced of his proposed intention of changing the beneficiary to his wife. Further in the case at Bar there is a Report of Death which is defendant's C in evidence (T page 87). This Report of Death specifically states that the Appellee is the beneficiary.

In *Walker* v. *United States,* 70 F. Supp. 422 at 425, the Court states "I think it is clear that the insured gave the proper written notice of change of beneficiary either on forms generally used in the army or by letter or other memorandum and that for some reason, due perhaps to the confusion instant to war, such forms, letters, etc., were not available for production here. This view is strengthened by the fact that when the soldier was killed in action, his wife and not his his mother was notified and all of the other benefits like allotments, and so forth, have been paid to the wife." That case further states "an ordinary signed letter or memorandum containing sufficient information, is sufficient in war." "While the wife here has the burden to show such notice was given, the fact it was given may be given by circumstantial evidence." That same case, supra, is even more analogous to the case at Bar in that the District Court of the South District of Texas found that letters sent the wife by the insured, both while in the States and abroad, showed clearly that he intended his wife to be the beneficiary. The "Report

of Death" made by the Adjutant General of the War Department to the Veterans' Administration showed his wife as beneficiary. Some of the letters of the insured to his wife had indicated he had taken steps to change his beneficiary. The District Court concluded that the information regarding the wife being the beneficiary must have come to the War Department from the insured, and that circumstantial evidence showed that a change of beneficiary had been made. It is interesting to note in the case at bar that the Appellant's name was not mentioned whatsoever in the beneficiary section of the "Report of Death." He was not even mentioned as contingent or second contingent beneficiary. It is also interesting to note that by his own testimony (T page 77) the Appellant admitted that the deceased veteran would write to him but he never once mentioned anything about his G. I. Insurance.

In *Mitchell* v. *United States,* 165, F. 2nd 758, the Court states that it is not one piece of evidence standing alone but all the evidence together should be considered as to the manifestation of intent and the affirmative act required. It specifically states "the Court will brush aside technicalities." "It is said that a combination of intent and act is required, but to say in these insurance cases that though intention to change the beneficiary is proved to the hilt, no effective formal acthaving been done no change can be held to have been done, *is not to brush technicalities very far aside.*"

The Appellee submits that the Courts in these various cases do not require that the notice of the change of beneficiary be sent to the Veterans' Administration at any particular time. In the *Scott* v. *Johnson,* 71 F. Supp. 114.4 case, the Court states "it seems clear to me that the deceased did everything prior to his death

necessary to secure a change of beneficiary. His letter of August 27, 1942 is clear and explicit in this respect. There remained only the necessity of his wife forwarding this to the Veterans' Administration; instead of doing so she wrote a letter herself." In criticizing the Bradley case, supra, a note in 1954 Yale Law Journal 451 states that the doctrine upon which the Court's decision was predicated namely that although strict compliance with regulation is not necessary to perfect a change of beneficiary when the intent to change is clear, the insured must have done everything reasonably within his power to accomplish his purpose if equity is to heed it, as conflicting with the great majority of war risk insurances cases which allow reform of the policy upon proof of intent alone. (See 2 A.L.R. 2nd 498-499). The Appellant on page 12 of his brief points out to the court that in a record of emergency data, defendant's Exhibit D in evidence, (T page 88), there were written the words "I understand that this form does not designate or change life insurance policy beneficiaries and that any such designation or change can only be effected by separate action originated by me." It is a fair assumption that the deceased veteran would pay no heed to this particular wording in that on January 26, 1949 and again on February 2, 1949 the deceased veteran was of the belief that he had taken affirmative action to change the beneficiary over to his wife. The stated Record of Emergency Data was dated February 2, 1949, and it can certainly be considered that the deceased veteran if he did note this wording did not desire to change the beneficiary back to the Appellant.

The Appellee submits that it can in substance be agreed upon that all these cases involving National Service Life Insurance policies turn on their own par-

ticular facts and merits. The case of *Butler* v. *Butler,* 177 F. 2nd 471 (5th Cir., 1949), which it seems Appellant is almost exclusively relying upon, seems to be a definite example of that rule. The Court in that particular case seemed to turn its decision on the particular merits and facts of that particular case and specifically stated "there is not sufficient proof of the intent." The Court in the Butler case, supra, states that the *Gann* v. *Meek case* (5th Cir., 165 F. 2nd 857) is not being reversed by that particular Circuit, but that the two cases in question must turn on their own particular merits and facts. In the Gann case, the Court held that a definite manifestation of intent was shown in that the deceased veteran in that particular case did state "I did change my insurance." This is exactly what has taken place in the case at Bar. The Court in the Butler case, supra, certainly by very strong intimation and dictum stated that if there would have been complete and clear manifestation of intent then not so much is required as to the affirmative action. The Butler case, supra, at best—stands by itself and is not analogous to the case at Bar in that no such definite manifestation of intent was shown in that particular case and no "Report of Death" was submitted. It is not material or relevant that a small private insurance policy was changed over by the required methods of the private insurance company in the case at Bar. It can not be argued that two very different rules govern insofar as National Service Life Insurance and private insurance is concerned.

## CONCLUSION

The Appellee has pointed out to the Court the various governing cases insofar as these matters are concerned. There are many more cases that can be submitted. However, it is the Appellee's belief that the Court is most familiar with the cases involved in these matters and it is not the desire of the Appellee to belabor the Court any further with further citation of cases. It is the Appellee's belief that this Court is exceptionally familiar with these matters in that the Kendig case, supra, and the Collins case, supra, were handed down as the law in this particular Circuit. The Appellee submits that this case is even stronger than the Kendig case. It is stronger in that evidence of the manifestation of intent to change the beneficiary has been passed on and evidence of some affirmative act has also been passed on, not only by the Trial Court in this particular matter, but by the authorized administrative investigative body. After very lengthy and thorough consideration by the foregoing investigative body and the Trial Court it was found as a matter of fact that sufficient manifestation of intent and an affirmative act were shown. The Kendig case, supra, states in essence that these facts should have been considered by the trier of facts, to-wit: the jury. The Appellee submits that the fact finders have passed on these elements and have found those facts in favor of the Appellee. It can not be assumed that only a mere intent to change the beneficiary was found. It must of necessity, and there is enough substantial evidence to warrant the finding of those facts, that the necessary elements were clearly shown. The Apellee submits that the facts have been passed on and that the Court correctly found his Conclusions of Law

thereto and that the Court correctly entered its judgment in favor of the Appellee. The judgment should be affirmed.

Respectfully submitted,

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